

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION

In the Matter of the PERA Salary  
Determinations Affecting Retired and  
Active Employees of the City of Duluth,  
Allen Johnson, et al., Petitioners

**ORDER ON MOTION TO COMPEL  
DISCOVERY AND EXTEND  
DISCOVERY DEADLINES**

This matter came before Administrative Law Judge Bruce H. Johnson (the ALJ) on the Motion by Petitioners Ostman, Purcell and Behning, Michog, Edwards, Belanger, Salveson, Peterson, Harvey, Charbonneau, Johnson, and Wedin (Movants) to Compel Discovery and Extend Discovery Deadlines (collectively, Motion to Compel). Movants filed the motion on December 2, 2009, and the City of Duluth (City) responded on December 23, 2009. The record on the motion closed on that date.

Elizabeth A. Storaasli, Dryer Storaasli Knutson & Pommerville, Ltd., appeared on behalf of the Petitioners. Lisa D. Wilson, Assistant City Attorney, appeared on behalf of the City of Duluth (City).

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**ORDER**

IT IS HEREBY ORDERED that:

- (1) The Movants' Motion to Compel Discovery is **DENIED**;
- (2) The Movants' motion to Extend Deadlines is **GRANTED**;
- (3) The Movants' motion to recover attorneys fee is **DENIED**; and

(3) The parties may continue to conduct further discovery and file dispositive motions pending further orders of the Administrative Law Judge.

Dated: January 7, 2010

s/Bruce H. Johnson  
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BRUCE H. JOHNSON  
Assistant Chief Administrative Law Judge

## MEMORANDUM

### I. Prior Proceedings

In September 2008, the City of Duluth (the City) advised PERA that since 1996 it had been erroneously treating certain amounts paid to, or on behalf of, a group of City employees as “salary” for PERA reporting purposes and had erroneously made employer/employee contributions to PERA based upon those amounts. PERA subsequently concluded that certain amounts had, in fact, been erroneously reported as “salary.” As a result, it believed that: (1) the affected employees were eligible for a refund of employee contributions made on the invalid salary amounts; 2) that the City was eligible for a refund of employer contributions made on the invalid salary amounts; (3) the benefits paid to retired employees must be reduced; and (4) it was necessary for PERA to recover the amount of overpaid benefits from affected retirees.<sup>1</sup>

On July 10, 2009, the PERA Board of Trustees issued Notices of Hearing in 70 separate contested cases to current and retired employees of the City of Duluth. The purpose of those proceedings was to determine whether certain amounts paid by the City to, or on behalf of, Petitioners constitute “salary” for purposes of their PERA retirement plan. On August 13, 2009, PERA filed a petition to consolidate all 70 contested case proceedings into a single proceeding. On August 21, 2009, the ALJ conducted a prehearing conference in all of the pending associated contested cases. By Order entered on August 26, 2009, the ALJ concluded that all of the proceedings involved common questions of law but not necessarily common questions of fact, and ordered that all of the proceedings be consolidated for purposes of discovery and considering and adjudicating any dispositive motions.

The Movants are parties to this consolidated contested case. On September 30, 2009, some of them filed a motion for compulsory joinder of the City as a party to this proceeding. On October 15, 2009, before the ALJ ruled on that motion, the Movants prepared and issued a set of Combined Interrogatories and Requests for Production of Documents (Combined Discovery Request) directed to the City. On the following day, the Movants requested a subpoena from the Chief Administrative Law Judge directing the City to produce the documents that were described in the attached Combined

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<sup>1</sup> See Notices of Hearing.

Discovery Request. On October 19, 2009, the requested subpoena was issued and forwarded to counsel for the Movants. In other words, the Combined Discovery Request was prepared and the associated subpoena requested in anticipation that the motion for compulsory joinder would be granted and that the City would thereby become a party to this contested case proceeding. By letter dated October 21, 2009, the Movants served the Combined Discovery Request and the associated subpoena on the City. However, on the previous day, the ALJ had issued an Order denying the motion for joinder, and the City therefore never acquired party status in this proceeding. It was therefore never obliged to respond to the various kinds of discovery requests to which a *party* must respond under Minn. R. Civ. P. 26.01.

On November 16, 2009, the City filed objections to the subpoena. Although the City agreed to supply the Movants with some of the documents described in the Combined Discovery Request, as a non-party, the City objected to answering any of the attached interrogatories and objected to production of other documents on grounds that some requests were overly broad, unduly burdensome, beyond the scope of this proceeding, privileged or contained not public information under Minn. Stat. Ch. 13.

The Movants did not respond directly to the City's objections to the subpoena. Rather, on December 2, 2009, the Movants filed the pending Motion to Compel. The relief that the Movants now seek is: (1) an order compelling the City to comply in full with the subpoena issued by the Chief Administrative Law Judge on October 19, 2009; (2) an order extending the deadlines for completing discovery and for filing and responding to dispositive motions; and (3) an order awarding attorneys fees associated with the Motion to Compel .

On December 23, 2009, the City filed a response to the Motion to Compel in which it essentially reasserted the objections previously raised in its November 16, 2009, objections to the subpoena previously served by the Movants on the City.

## **II. The ALJ Lacks Authority to Enforce the Subpoena**

As the Movants correctly point out, Minn. R. 1400.6700, subp. 2, provides that "[a]ny means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed." However, unlike judges of the district court, ALJs have neither general jurisdiction nor inherent powers. They may only exercise such jurisdiction and powers that the Legislature has conferred on them. The Movants cite Minn. R. Civ. P. 45.02 as authority for the ALJ to compel the City to comply with the subpoena in question. First of all, Rule 45.02 is not a discovery rule. Rather it deals generally with the process for serving all kinds of subpoenas in the district court. Second, even if one were to construe Minn. R. Civ. P. 45.02 as a discovery rule, that construction would be in direct conflict with Minn. Stat. § 14.51, which provides in part:

Upon the chief administrative law judge's own initiative or upon written request of an interested party, the chief administrative law judge may issue a subpoena for the attendance of a witness or the production of books, papers, records or other documents as are material to any matter

being heard by the Office of Administrative Hearings. *The subpoenas shall be enforceable through the district court in the district in which the subpoena is issued.* [Emphasis supplied.]

In short, Minn. Stat. § 14.51 does not empower the Chief Administrative Law Judge in any circumstance to enforce a subpoena he issues, notwithstanding anything to the contrary in Rule 45.02. If the Movants wish to enforce the subpoena at issue, they must do so in district court.

### **III. The ALJ Lacks Authority to Impose Discovery Sanctions on a Non-Party**

Minn. R. 1400.6700, subp. 2 and 3, describe the process and sanctions available for addressing noncompliance with discovery requests:

Subp. 2. **Discovery of other information.** \* \* \* If the *party* from whom discovery is sought objects to the discovery, the party seeking the discovery may bring a motion before the judge to obtain an order compelling discovery. In the motion proceeding, the party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant the discovery. In ruling on a discovery motion, the judge shall recognize all privileges recognized at law.

Subp. 3. **Noncompliance.** Upon the failure of a *party* to reasonably comply with an order of the judge made pursuant to subpart 2, the judge may make a further order as follows:

A. an order that the subject matter of the order for discovery or any other relevant facts shall be taken as established for the purposes of the case in accordance with the claim of the *party* requesting the order;

B. an order refusing to allow the *party* failing to comply to support or oppose designated claims or defenses, or prohibiting that *party* from introducing designated matters in evidence. [Emphasis supplied.]

Those rule provisions recognize an ALJ's lack of statutory authority over entities which are not parties to a contested case proceeding. Subpart 2 expressly applies only to objections of *parties* from whom discovery is sought, and the sanctions for noncompliance available in Subpart 3 deal exclusively with limiting evidence that can be received during an evidentiary hearing. Those are sanctions that are expressly applicable and meaningful only to *parties* to the contested case. In summary, there is nothing in statute or rule that empowers an ALJ to compel a nonparty to comply with a discovery request made in a contested case, nor is an ALJ empowered to impose sanctions on a nonparty that refuses to comply.

#### **IV. The ALJ Lacks Authority to Assess Attorneys Fees**

As discussed above, ALJs do not possess general jurisdiction or inherent powers. Although some statutes give ALJs statutory authority to award attorneys fees in particular situations, the Legislature has never granted ALJs general authority to award attorneys fees in contested cases. For example, the Minnesota Equal Access to Justice Act (MEAJA)<sup>2</sup> authorizes an award of attorney fees and expenses to certain kinds of prevailing parties in contested cases where a *state agency* position is not “substantially justified.”<sup>3</sup> But an attorneys fees award under MEAJA is only available to small business organizations; moreover, attorneys fees cannot be obtained from parties who are not state agencies.<sup>4</sup> A further example is the Minnesota Human Rights Act, which allows an ALJ to assess the cost of representation by the Attorney General’s Office against a respondent who is determined to have engaged in an unfair discriminatory practice.<sup>5</sup> However, there is no provision of law authorizing an ALJ to assess attorneys fees against a nonparty who fails to comply with a subpoena issued by the Chief Administrative Law Judge.

#### **V. The Discovery Deadline Should be Extended**

The ALJ is not in a position to order or require a resolution to this pending discovery dispute. If the Movants and the City are unable to arrive at mutual agreement on production of the remaining disputed items, it will be necessary for the Movants to take this dispute to the Ramsey County District Court.<sup>6</sup> Fairness therefore requires an extension of discovery deadline pending an agreement of the parties or an order of that District Court. The ALJ also notes that the PERA staff recently filed a motion for summary disposition, the adjudication of which could possibly obviate the need for some of the requested discovery. The deadlines for discovery and dispositive motions have therefore been extended indefinitely pending further orders of the ALJ.

In view of the foregoing, the Movants’ motions to compel discovery and to award attorneys fees are denied, and the motion to extend deadlines for discovery and dispositive motions is granted.

**B.H.J.**

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<sup>2</sup> Minn. Stat. §§ 15.471 to 15.474.

<sup>3</sup> Minn. Stat. § 15.471, subd. 8.

<sup>4</sup> Minn. Stat. § 15.471, subd. 6.

<sup>5</sup> Minn. Stat. § 363A.29, subd. 11.

<sup>6</sup> Minn. Stat. § 14.51 requires that enforcement proceedings be initiated in the district court in the district in which the subpoena is issued.